Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-923

JAMES CECIRE, CARMINE BRACCO, JAMES HAYES, ANGUS CAMPBELL, AL KERR and EARL SHEPARD, as Trustees of the Seafarers Vacation Plan,

Petitioners,

against

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

RAYMOND McKAY, GORDON SPENCER, CHARLES LAPORTE, GERALD PINISI, ALFRED H. RIGGS, C. J. BRACCO, MICHAEL KLEBANOFF and WILLIAM H. CRIPPEN, as Trustees of the District 2, M.E.B.A. Vacation Plan,

Petitioners,

against

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

RESPONDENT'S JOINT BRIEF IN OPPOSITION TO CERTIORARI

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RESPONDENT'S JOINT BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

In the New York courts this case is reported as follows: 59 Misc. 2d 380, 298 N.Y.S. 2d 829 (*McKay* v. *Stewart*; the *Cecire* v. *Stewart* decision in the State Supreme Court is unreported), affirmed 35 A.D. 2d 556, 313 N.Y.S. 2d 545

(McKay) and 35 A.D. 2d 548, 314 N.Y.S. 2d 329 (Cecire), both reversed at 29 N.Y. 2d 563, 272 N.E. 2d 887, reargument denied 29 N.Y. 2d 749 and remittitur amended 29 N.Y. 2d 746.

Statement of the Case

The actions challenge the validity of the Insurance Law § 37-a as interpreted to include petitioners' vacation funds within the statutory definition. The federal grounds asserted by this petition are (1) preemption by Congress and (2) unconstitutional vagueness.

The plans were established, pursuant to collective bargaining agreements, because many members of the unions normally work for several employers during the year as work demands shift and would not qualify for a vacation with any single one of them. Therefore, to allow for a yearly paid vacation, the plans require each employer to pay a percentage of its covered employees' wages to the funds which hold them in trust and in turn pays the vacation to the workers.* Benefits are earned on the basis of total work with plan employers.

The reporting and registration requirements of Article III-A of the Insurance Law of New York are of relative longstanding (L. 1956, c. 774). Indeed they predate the federal legislation of the Labor Management Reporting and Disclosure Act in this field. The New York State Legislature declared that employee-welfare funds are of great benefit to employees and their families but that the "funds should be supervised by the state to the extent necessary

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* The Record in the state courts included as exhibits the Trust Agreements, (*Cecire*, p. 28, *McKay*, p. 29). Both stated that the trusts were accepted in the State of New York and all legal issues and questions shall be construed and decided in accordance with the laws of the State. (Article VIII, Miscellaneous of both Plans, "3" in *Cecire*, "2" in *McKay*).

to protect the rights of employees and their families . . ." (Insurance Law § 37).

The long-standing policy and application of the welfare Fund Bureau of the State Department of Insurance has been to require registration and reporting of vacation plan trust funds together with other bilateral welfare funds. This was in accordance with the opinion of the State's Attorney-General (1963 Op. Atty. Gen. 35) and the overwhelming majority of said vacation trust funds had registered with the Department before the two petitioner Vacation Funds brought the instant cases.*

Petitioners, instead of registering, instituted actions for declaratory judgment in the state court, urging that the Funds were not required to register and seeking to enjoin the Department from enforcing registration.

Congress gave deep consideration to these bilateral welfare funds. Bearing in mind that such funds when created become trust and insurance funds within New York's and other state's statutes and require the application of principles of trust and insurance law and therefore become subject to state law (15 U.S.C. § 1011, the "McCarran Act"), Congress in enacting the Welfare and Pension Act of 1958 (29 U.S.C. § 300 *et seq.*), expressly provided for continued state regulation and supervision.

Congress sought thereby to invite more effective state regulation. This is also indicated by Senate Report No. 1440, April 21, 1958 (as reported in U.S. Code Congressional and Administrative News, 85 Congress, Second Session, 1958, Vol. III, p. 4153):

> "There is no desire to get the Federal Government involved in regulation of these plans but a disclosure

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* The records of the Department show that 77 such funds have registered and six such funds are known to the Department not to have registered. This includes the two funds involved in the instant litigation.

> statute which is administered in close cooperation with the States could also be of great assistance to the States in carrying out their regulatory functions."

and again in the Final Report of the Committee on Labor and Public Welfare, submitted by the subcommittee on Welfare and Pension Funds (reported in Sen. Misc. Reports on Public Bills, Vol. 11887, at p. 8):

> "Disclosure of the working of the Welfare and Pension Plans to a Federal agency is a mild remedy, reserving to the States a wide area for additional control. There is much room in fact at the State level for enactment of legislation designed to more clearly fix the responsibilities of trustees and to strengthen insurance regulations."

The Congress recognized similar problems when it passed the Labor-Management Relations Act in 1959. Thus while 29 U.S.C. § 186 continued a prohibition on payments to unions, it, in subd. (d), allowed welfare funds and vacation funds thereunder if they met certain specified conditions. The instant vacation funds in this case apparently meet those conditions so that is not an issue. At the same time Congress enacted 29 U.S.C. § 301 *et seq.* This the Welfare and Pension Plan Disclosure Act.

The Congress stated the policy of the United States to promote industrial peace and stability through the settlement of labor disputes via collective bargaining. 29 U.S.C. § 171. Congress also passed the Welfare and Pension Plans Disclosure Act to promote the employees' information thereof. 29 U.S.C. § 302.

The Court of Appeals held that the Funds were providing "benefits" which were included in the statutory definition of covered funds in Insurance Law, § 37-a. The underlying reason for the enactment of Article III-A (Insurance Law § 37 *et seq.*), was the protection of employees and their families from irregularities of these

trust funds by registration with reports to and examination by the Superintendent.

The remittiturs were amended to show that the Court of Appeals had considered and rejected arguments that its interpretation made the statute vague and that the Congress had preempted the field. [The lower court opinions had held that the statutory language's coverage did not embrace these vacation trust funds, and, therefore, did not reach any constitutional question.]

Reasons for Denying Certiorari

A. No substantial question of federal preemption exists, especially where Congress has invited state action.

The claim of federal preemption was discussed in *People* v. *Automobile Transporters Welfare Fund*, 17 A.D. 2d 448, 451-453, 235 N.Y.S. 2d 702 (1st Dept. 1962), *aff'd*, 13 N.Y. 2d 814, 192 N.E. 2d 222, 242 N.Y.S. 2d 345 (1963), *cert. den.* 376 U.S. 908, where the Appellate Division discussed the congressional history of the statute which demonstrated the intent of Congress to insure that the regulation of these funds should not be interfered with and cited *inter alia*, *DeVeau* v. *Braisted*, 363 U.S. 144, 80 S. Ct. 1146 (1960) and *Matter of Thacher* (*United Construction Workers*), 10 N.Y. 2d 439, 180 N.E. 2d 245, 224 N.Y.S. 2d 657 (1962). The State provisions have no effect on the collective bargaining agreement. New York is concerned only with the welfare and protection of the beneficiaries of the trust funds already agreed upon and incorporated in the trust indenture drawn as a result of the collective bargainging (*supra*, p. 2). The State is dedicated to the purpose of insuring that all such funds are honestly administered.

The "potential conflict" (Pet. joint brief, p. 14) is a mirage. It has not occurred in the more than fifteen years since the state's statute requiring registration was enacted

in 1956 and ten years since the *Automobile Transporters'* case (*supra*) and, as we have said, only petitioners and four others have failed to register these trust funds. The fact that the state law (Insurance Law Article III-A) imposes more stringent requirements than the qualifying exception to 28 U.S.C. § 186 does not create such conflict (*supra*, p. 4). As we have pointed out the Senate Committee on Labor and Public Welfare called the federal requirements "mild" and stated that it left "much room in fact" for more stringent possible preemption or conflict. *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 406 (S.D.N.Y. 1964), *aff'd*. 364 F. 2d 241 (2d Cir. 1966) *cert. den.* 385 U.S. 1036; *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 143, 83 S. Ct. 1210 (1963); *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630, 635 (S.D.N.Y. 1970), *aff'd*. 440 F. 2d 1319 (2nd. Cir. 1971), *cert. den.* —— U.S. ——, 40 U.S.L.W. 3263. *Fitzgerald* v. *Catherwood*, 388 F. 2d 400, 405-406 (2d Cir. 1968), *cert. den.* 391 U.S. 934.

In view of the fact that Congress went as far as it could to permit the states to exercise its traditional supervision and regulation of these trust funds, the contention that the federal statute (29 U.S.C. § 309) does not include the vacation trust funds and that therefore, the state statute may not be read to include such funds, is obviously not maintainable. Congress left it to the states to apply its traditional trust regulation albeit with more comprehensive requirements. Petitioners' vacation plans are organized and function in exactly the same manner as other employees' welfare funds subject to § 309 or Article III-A of New York's Insurance Law. Certainly when a court was asked to differentiate it saw "no good reason" for so doing. *Matter of Feller*, 196 Misc. 18, 20-21; 82 N.Y.S. 2d 852 (Sup. Ct., N.Y. County, 1948) on enforcing arbitration agreements.

The effort of petitioners to bring in apprentice programs, School of Seamanship (Joint Petition p. 16) or any other activity of this or any other labor union is belatedly in-

jected here. It was not presented to the courts below and therefore merits no consideration. *Rosenthal* v. *New York*, 226 U.S. 260, 272, 33 S. Ct. 27 (1912); *Hedgebeth* v. *North Carolina*, 334 U.S. 806, 68 S. Ct. 1185 (1948). In any event there has been no question raised as to the inclusion of any such programs in New York's statute. The New York court has simply held that bilateral vacation trust funds like other welfare trust funds are within the statute and the trustees should register such trust funds.*

B. The statutory language is not subject to due process challenge for vagueness.

Since the statutory language in Article III-A of the Insurance Law has been consistently interpreted by the Insurance Department to include vacation trust funds, the state's Attorney General has upheld this interpretation (1963 Opin. Atty. Gen. 35) and almost all the bilateral vacation trust funds have registered and complied with the State law provision. Therefore it borders on the frivolous to raise due process questions of vagueness applicable to cases that impose some penalty on petitioners. *Connally* v. *General Construction Co.*, 269 U.S. 385, 393, 46 S. Ct. 126 (1926).

The purpose of the "void for vagueness" rule is to give such accused sufficient warning of the kind of activity which is made criminal. *Communications Ass'n* v. *Douds*, 339 U.S. 382, 413, 70 S. Ct. 674 (1950); *Williams* v. *United States*, 341 U.S. 97, 100, 71 S. Ct. 576 (1951). In criminal

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* Similarly reference to Article II-A of the New York Banking Law is pointless. This Act (Banking Law, § 61, subd. 1) covers only a fund where "over-all management of such fund vested, along or jointly with other trustees, in a corporate trustee which is subject to supervision by the Superintendent of Banks of this State or any other state or is a member of the federal reserve system"—this means where a bank manages a trust fund. Petitioners, of course, are not such a fund and are not subject to § 61 but rather only to Insurance Law § 37-a.

cases, a defendant might be charged "with knowledge of the scope of subsequent interpretation" by the courts. *Winters* v. *New York*, 333 U.S. 507, 514, 68 S. Ct. 665 (1948); *People* v. *Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829, 281 N.Y.S. 2d 9 (1967), *cert. den.* and *app. dsmd.* 390 U.S. 29 (1968). See also *United States* v. *Harriss*, 347 U.S. 612, 618, 74 S. Ct. 808 (1954).

Moreover, the actions here are for declaratory judgment, not criminal actions and thereby the petitioners have received the judicial declaration by the highest state court that they have to register as required by the state statute and have availed themselves of the opportunity afforded to review the administrator's interpretation of the statutory language instead of subjecting themselves to a "wilful" violation (Ins. Law, § 37-1[7] [a]). *Yakus* v. *United States*, 321 U.S. 414, 444, 64 S. Ct. 660 (1944).

It is obvious that there is no basis for the contention by petitioners justifying any further consideration of this criticism of the statute.

CONCLUSION

The joint petition for a writ of certiorari should be denied.

Dated: New York, New York, March 6, 1972.

Respectfully submitted,

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